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10 Attorneys for Defendant
KAWAUM MARQUEZ SCOTT

11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
13 **EASTERN DIVISION**
14

15 UNITED STATES OF AMERICA,
16
17 Plaintiff,
18 v.
19 KAWAUM MARQUEZ SCOTT,
20 Defendant.
21
22
23

Case No. ED CR 13-116-VAP

**NOTICE OF MOTION; MOTION
TO SEVER MR. SCOTT'S TRIAL
FROM THAT OF CO-DEFENDANT
NEKEYIA NECOLE WEATHERSPOON;
MEMORANDUM OF
POINTS AND AUTHORITIES**

**Hearing Date: May 19, 2014
Hearing Time: 10:00 a.m.**

24 **TO: UNITED STATES ATTORNEY ANDRÉ BIROTTE, JR. AND**
25 **ASSISTANT UNITED STATES ATTORNEY THOMAS D. STOUT:**

26 PLEASE TAKE NOTICE that on May 19, 2014 at 10:00 a.m., or as soon
27 thereafter as counsel may be heard, defendant Kawaum Marquez Scott will make the
28 following motion:

MOTION

Defendant Kawaum Marquez Scott, by and through his counsel of record, Deputy Federal Public Defenders Koren L. Bell and Young J. Kim, hereby moves this Honorable Court for an order severing his trial from the trial of co-defendant Nekeyia Necole Weatherspoon.

This motion is based on Rule 14 (a) of the Federal Rules of Criminal Procedure, the Sixth Amendment to the United States Constitution, the attached Memorandum of Points and Authorities, all files and records in this case, and any further evidence as may be adduced at the hearing on this motion.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: April 28, 2014

By /s/ Young J. Kim
YOUNG J. KIM
Deputy Federal Public Defender

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 On November 27, 2013, the government charged Kawaum Marquez Scott and
5 Nekeyia Necole Weatherspoon in a six-count Indictment with sex trafficking of a child
6 and conspiracy to engage in sex trafficking of a child. Trial is scheduled for May 27,
7 2014. According to the discovery, Ms. Weatherspoon gave several statements to law
8 enforcement which implicate Mr. Scott.

9 The Court should sever Mr. Scott's trial from Ms. Weatherspoon's trial
10 because the two defendants' defenses are antagonistic and mutually exclusive, and
11 the use of Ms. Weatherspoon's statements at a joint trial would infringe on Mr.
12 Scott's Sixth Amendment right to confrontation.
13

14 **II.**

15 **STATEMENT OF FACTS**

16 On November 14, 2013, Nekeyia Weatherspoon and Kawaum Marquez Scott
17 were arrested by agents of the Federal Bureau of Investigation ("FBI") pursuant to an
18 arrest warrant issued in this case. FBI 302, dated 11/25/13 attached as Exhibit A. Ms.
19 Weatherspoon was interviewed by the FBI on that date. Id. During that interview, Ms.
20 Weatherspoon made several statements that implicate Mr. Scott. Attached as Exhibit B
21 are excerpts of a video recording of Ms. Weatherspoon's interview with the FBI.
22

23 Specifically, Special Agent Jeff Stiff of the FBI questioned Ms. Weatherspoon
24 about who received the proceeds from the prostitution of the victim in this case. At
25 time stamp 14:22:40 of Exhibit B, Agent Stiff asked Ms. Weatherspoon, "does
26 Kawaum come and take the money?" Ms. Weatherspoon responded, "I give it to him."
27 Id. Later in the interview, Agent Stiff inquired about ads for prostitution of the victim
28 posted on the website "Backpage.com." At time stamp 14:28:52 of Exhibit B, Agent

1 Stiff asked Ms. Weatherspoon, “did you ever post [victim]?” Ms. Weatherspoon
 2 responded: “I never posted [victim].” Id. Agent Stiff followed up with the question,
 3 “[Kawaum] posted through his laptop?” Id. Ms. Weatherspoon responded, “yes”. Id.

4 On April 24, 2014, defense counsel for Ms. Weatherspoon filed a Notice of
 5 Intent to Call Expert at Trial. See Dkt. 58. Ms. Weatherspoon’s notice states that her
 6 proposed expert, Nancy Kaser-Boyd, Ph.D., A.B.A.P., will testify regarding “the
 7 components and an explanation of the ‘battered women’s syndrome;’ her examination
 8 and conclusions concerning her examination of [Ms. Weatherspoon;] and whether or
 9 not [Ms. Weatherspoon] was suffering under the ‘battered woman’s syndrome’ at the
 10 time of her commission of the offenses herein and to such other matters which relate
 11 thereto. Id.

12 **III.**

13 **ARGUMENT**

14 Rule 14 of the Federal Rules of Criminal Procedure provides as follows:
 15

16 (a) Relief. If the joinder of . . . defendants in an
 17 indictment . . . appears to prejudice a defendant . . . the
 18 court may . . . sever the defendants' trials, or provide
 19 any other relief that justice requires.

20 (b) Defendant's Statements. Before ruling on a defendant's
 21 motion to sever, the court may order an attorney for the
 22 government to deliver to the court for in camera
 23 inspection any defendant's statement that the government
 24 intends to use as evidence.

25 Fed. R. Crim. P. 14 (2002). Although the decision to grant or deny a request for severance
 26 is left to the sound discretion of trial courts, severance is mandated under Rule 14(a) when
 27 “there is a serious risk that a joint trial would prejudice a specific trial right of one of the
 28

1 defendants, or prevent the jury from making a reliable judgment about guilt or innocence.”
 2 Zafiro v. United States, 506 U.S. 534, 539 (1993).

3 **A. The Court Should Sever the Defendants’ Trials Because their Defenses are**
 4 **Mutually Exclusive**

5 The trials should be severed because, as set forth in the in camera pleading filed
 6 separately, there is a serious risk that a joint trial would prevent the jury from making a
 7 reliable judgment about Mr. Scott’s guilt or innocence. While “mere inconsistency in
 8 defense positions is insufficient” to warrant severance, “antagonistic” defenses will
 9 justify a severance. United States v. Tootick, 952 F.2d 1078, 1081 (9th Cir. 1991). A
 10 jury may be prevented from making a reliable judgment “when evidence that the jury
 11 should not consider against a defendant and that would not be admissible if a
 12 defendant were tried alone is admitted against a codefendant. . . Evidence that is
 13 probative of a defendant's guilt but technically admissible only against a codefendant
 14 might also present a risk of prejudice.” Zafiro, 506 U.S. at 539.

15
 16 Respecting the prejudice that can arise from forcing a joint trial where defendants
 17 will pursue antagonistic and mutually exclusive defenses, the Ninth Circuit has reasoned
 18 as follows:

19 Defendants who accuse each other bring the effect of a second
 20 prosecutor into the case with respect to their codefendant. In order
 21 to zealously represent his client, each codefendant’s counsel must do
 22 everything possible to convict the other defendant. The existence of
 23 this extra prosecutor is particularly troublesome because the defense
 24 counsel are not always held to the limitations and standards imposed
 25 on the government prosecutor. Opening statements . . . can become a
 26 forum in which gruesome and outlandish tales are told about the
 27 exclusive guilt of the ‘other’ defendant. . . . Counsel can make and
 28

1 oppose motions that are favorable to their defendant, without objection
2 by the government.

3 Cross-examination of the government's witnesses becomes an
4 opportunity to emphasize the exclusive guilt of the other defendant or
5 to help rehabilitate a witness that has been impeached. Cross-
6 examination of the defendant's witnesses provides further opportunities
7 for impeachment and the ability to undermine the defendant's case. The
8 presentation of the codefendant's case becomes a separate forum in
9 which the defendant is accused and tried. Closing arguments allow a
10 final opening for codefendant's counsel to portray the other defendant as
11 the sole perpetrator
12 of the crime.

13 Id. at 1082. Accordingly, the Ninth Circuit has held that where the defendants' defenses
14 are "mutually exclusive," the trial court should sever the trials. See United States v.
15 Mayfield, 189 F.3d 895, 900 (9th Cir. 1999) (reversing conviction on appeal due to district
16 court's failure to sever trials where mutually exclusive defenses were presented); see also
17 United States v. Odom, 888 F.2d 1014, 1018 (4th Cir. 1989) (finding severance proper
18 where defendant's counsel continuously attacked codefendant and discussed his prior bad
19 acts).
20

21 In this case, the defense of Mr. Scott will be mutually exclusive with the
22 defense of Ms. Weatherspoon. As set forth in the accompanying in camera pleading,
23 their respective defense strategies set the stage for the "extra prosecutor" that the law
24 forbids. See Tootick, 952 F.2d at 1082. Further, as detailed in the accompanying in
25 camera pleading, and as evidenced by Ms. Weatherspoon's expert notice, see Dkt. 58,
26 Ms. Weatherspoon's anticipated defense strategy will present the jury with evidence --
27 namely, whether or not [Ms. Weatherspoon] was suffering under the 'battered woman's
28 syndrome' at the time of her commission of the offenses herein and to such other

1 matters which relate thereto -- “that would not be admissible if [Mr. Scott] were tried
 2 alone.” See Zafiro, 506 U.S. at 539. For the reasons set forth in the in camera
 3 pleading, his evidence would not only be irrelevant in a trial of Mr. Scott, standing
 4 alone, but is anticipated to be highly prejudicial to Mr. Scott, undermining his right to a
 5 fair trial. For these reasons, the Court should sever Mr. Scott’s trial from Ms.
 6 Weatherspoon’s.

7 **B. The Court Should Sever the Defendants’ Trials Because there is a Serious Risk**
 8 **that a Joint Trial would Prejudice Mr. Scott’s Sixth Amendment Right to**
 9 **Confrontation**

10 The Court should also sever Mr. Scott’s trial from Ms. Weatherspoon’s trial
 11 because, based on statements made to government agents by Ms. Weatherspoon post-
 12 arrest and in other fora, there is a serious risk that a joint trial would prejudice Mr.
 13 Scott’s Sixth Amendment right to confrontation. “The right to cross-examine one’s
 14 accusers is fundamental in our system of justice. Cross-examination is the principal
 15 means by which the believability of a witness and the truth of his testimony are tested.”
 16 United States v. Marsh, 144 F.3d 1229, 1240 (9th Cir.1998). Confrontation Clause
 17 violations can require a court to sever trials. See United States v. Gillam, 167 F.3d
 18 1273, 1276-77 (9th Cir.1999).

19 The serious risk that a joint trial would prejudice Mr. Scott’s right to confrontation
 20 arises should the government use any of Ms. Weatherspoon’s statements, which implicate
 21 Mr. Scott, at trial, and should Ms. Weatherspoon exercise her privilege against self-
 22 incrimination and choose not to testify at trial. At a minimum, through Ms.
 23 Weatherspoon’s post-arrest statements to Agent Stiff, she “was pointing an accusatory
 24 finger at” Mr. Scott. See United States v. Peterson, 140 F.3d 819, 822 (9th Cir.1998).
 25 Not only will it “not [be] difficult for the jury to determine that that person was the other
 26 defendant on trial,” id. at 822; here, it will be clear.
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 28

1 The Advisory Committee Notes to the 1966 amendment to Rule 14 specifically
2 recognize the possibility of prejudice and the need for a severance in this situation:

3 A defendant may be prejudiced by the admission in evidence against a
4 co-defendant of a statement or conversation made by that co-defendant.

5 The prejudice cannot be dispelled by cross-examination if the co-
6 defendant does not take the stand. Limiting instructions to the jury may
7 not in fact erase the prejudice.

8 Advisory Committee Notes, Fed. R. Crim. P. 14, 1966 Amendment.

9 In Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968),
10 the United States Supreme Court held that admission of a non-testifying defendant's
11 confession that implicated another defendant in a joint trial violated the other defendant's
12 Sixth Amendment right to confrontation. In so holding, the Court rejected the argument
13 that a limiting instruction could cure the violation.¹ The Court reasoned:

14 [T]here are some contexts in which the risk that the jury will not, or
15 cannot, follow instructions is so great, and the consequences of failure so
16 vital to the defendant, that the practical and human limitations of the jury
17 system cannot be ignored. Such a context is presented here, where the
18 powerfully incriminating extrajudicial statements of a codefendant, who
19 stands accused side-by-side with the defendant, are deliberately spread
20 before the jury in a joint trial It was against such threats to a fair trial
21 that the Confrontation Clause was directed.

22
23 Id. Thus, the Confrontation Clause bars the use of a non-testifying co-defendant's
24 extrajudicial statement which incriminates the defendant and which is not otherwise
25 admissible against the defendant. Id. at 126. Accordingly, if the government intends to
26 use any of Ms. Weatherspoon's statements as evidence against Mr. Scott, the Court must
27 sever his trial from her trial. At the least, the Court should issue an order
28

1 precluding the government from introducing Ms. Weatherspoon's statements at a joint
2 trial with Mr. Scott.

3 **IV.**

4 **CONCLUSION**

5 For the foregoing reasons, Mr. Scott respectfully requests the Court to order that
6 his trial be severed from the trial of co-defendant Ms. Weatherspoon. At the least, the
7 Court should issue an order precluding the government from introducing Ms.
8 Weatherspoon's statements at a joint trial.
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10 Respectfully submitted,

11 SEAN K. KENNEDY
12 Federal Public Defender
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14 DATED: April 28, 2014

15 By /s/ Young J. Kim
16 YOUNG J. KIM
17 Deputy Federal Public Defender
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